Lam Ching v Yong Selawati Alias (practising as Messrs Norashikin Yong & Partners (previously known as Messrs Yong Alias & Co))

HIGH COURT (SHAH ALAM) — SUIT NO 22NCVC-415–08 OF 2015
WAN AHMAD FARID JC
22 SEPTEMBER 2016

Legal Profession — Duty of care — Negligence — Whether defendant breached fiduciary duties and trust — Whether defendant breached terms of retainer — Whether defendant negligent in obtaining consent judgment — Whether letter from defendant carried any legal connotation — Whether defendant in breach of fiduciary duties

The plaintiff was involved in a motor accident that was caused wholly or substantially by a motor lorry and another driver of a motorcar. As a result, the plaintiff suffered pain, injury and severe disabilities. The plaintiff had initially appointed the defendant, a firm of solicitors (Messrs Yong Alias & Co) and by letter dated 4 January 2005, authorised the defendant to act for him for the purposes of filing a civil suit against the drivers and/or registered owners of both vehicles. Despite intense negotiations with Kurnia Insurance, the plaintiff was unhappy with the lack of progress and unbeknown to the defendant, approached another legal firm, Messrs Saha & Assoc ('Messrs Saha') to take over the matter. In October 2007, Messrs Saha filed a civil action on behalf of the plaintiff in the sessions court. There was no settlement reached and the case did not proceed to trial. Consequently, the plaintiff met the defendant and executed a letter dated 29 July 2009 formally appointing the defendant to represent him in the sessions court summons, agreeing on the settlement sum of RM150,000. The defendant secured amicable settlements from insurance companies for both the motorcar and lorry for a total sum of RM155,000. The defendant conceded that because the sum suggested by Messrs Saha was not up to his expectation, he reverted to the defendant's firm to take conduct of the matter. The defendant then secured agreements from both insurance culminating in the recording of judgments by consent. For professional services rendered, the defendant was paid RM45,500. Before consent judgments were entered, Messrs Saha filed an application to intervene in order to obtain legal fees for professional services rendered to the plaintiff. The plaintiff engaged the defendant to resist said application which the defendant was successful. Messrs Saha entered a summary judgment against the plaintiff in a suit for RM39,8777.10 with interest as at 7 July 2015 stood at RM60,266.06. The plaintiff's appeal against the summary judgment was dismissed by the High Court. The plaintiff relying on exh D59, which was a

letter dated 3 August 2009 from the defendant addressed to Messrs Saha claimed that the defendant was negligent in the advice she gave and failed to give during the period leading up to the consent order and the defendant should have conducted reasonable discussion with Messrs Saha regarding the legal fees owed by the plaintiff. The plaintiff claimed: (a) breach of fiduciary duties and trust; and (b) breach of terms of the defendant's retainer and negligence.

Held, dismissing the plaintiff's claim with costs of RM30,000:

(1) Despite the existence of the word 'lien' in exh D59, it does not carry any legal connotation since as a matter of fact, the defendant was not holding or otherwise in possession of any money at the time of the issuance of the letter. As a whole, the word 'lien' remains a label and nothing more. The court has to look into the actual facts of the situation. Messrs Saha did not reply the letter in exh D59, so as to establish a *consensus ad idem* between the parties. There was no breach of fiduciary duty on the part of the defendant. What the defendant did in the circumstances could not be in anyway construed as having a connotation of disloyalty or infidelity to the plaintiff (see paras 27 & 29–30).

(2) The appropriate cause of action that should have been taken was to set aside the two consent judgments, as the plaintiff was under the impression that he was entitled for a higher amount than that was recorded in the judgments. The defendant did not fail on her contractual duty neither was she negligent because she did not settle for an amount that was less than the mandate given by the plaintiff. Therefore, there was no breach of the terms of retainer and the defendant was not negligent in carrying out her duty as the solicitor for the plaintiff (see paras 35 & 38–39).

[Bahasa Malaysia summary

Plaintif telah terlibat dalam kemalangan motor yang merupakan sebab keseluruhan atau sebahagiannya oleh lori motor dan pemandu lain kereta. Akibatnya, plaintif mengalami kesakitan, kecederaan dan ketidakupayaan yang teruk. Plaintif telah pada mulanya melantik defendan, sebuah firma peguamcara (Tetuan Yong Alias & Co) dan oleh surat bertarikh 4 Januari 2005, memberi kuasa kepada defendan untuk bertindak untuknya bagi tujuan memfailkan guaman sivil terhadap pemandu dan/atau pemilik berdaftar berhubung kedua-dua kenderaan. Walaupun rundingan sengit dengan Kurnia Insurance, plaintif tidak gembira dengan kekurangan kemajuan dan tidak diketahui oleh defendan, didekati oleh firma guaman laon, Tetuan Saha & Assoc ('Tetuan Saha') untuk mengabil alih perkara itu. Dalam bulan Oktober 2007, Tetuan Saha memfailkan tindakan sivil bagi tujuan plaintif di mahkamah sesyen. Tiada penyelesaian telah dicapai dan kes ini tidak diteruskan untuk perbicaraan. Seterusnya, plaintif telah berjumpa defendan

dan menyempurnakan surat bertarikh 29 Julai 2009 yang secara rasmi melantik defendan untuk mewakilinya dalam guaman mahkamah sesyen, yang bersetuju tentang jumlah penyelesaian RM150,000. Defendan memperoleh penyelesaian yang baik daripada syarikat-syarikat insurans untuk kedua-dua kereta dan lori bagi jumlah keseluruhan RM155,000. Defendan mengakui bahawa oleh kerana jumlah yang dicadangkan oleh Tetuan Saha tidak memenuhi jangkaannya, dia kembali kepada firma defendan untuk melaksanakan perkara itu. Defendan kemudian memperoleh perjanjian-perjanjian daripada kedua-dua insurans yang dinyatakan dalam rekod penghakiman-penghakiman dengan persetujuan. Bagi perkhidmatan profesional yang diberikan, defendan telah dibayar RM45,500. Sebelum penghakiman-penghakiman persetujuan dimasuki, Tetuan Saha telah memfailkan permohonan untuk campur tangan bagi tujuan mendapatkan yuran guaman untuk perkhidmatan profesional yang diberikan kepada plaintif. Plaintif telah melantik defendan untuk menentang permohonan tersebut yang mana defendan berjaya. Tetuan Saha telah memasuki penghakiman terus terhadap plaintif dalam guaman untuk RM39,8777.10 dengan faedah sehingga 7 Julai 2015 yang berjumlah RM60,266.06. Rayuan plaintif terhadap penghakiman terus telah ditolak oleh Mahkamah Tinggi. Plaintif bergantung kepada eksh D59, yang merupakan surat bertarikh 3 Ogos 2009 daripada defendan dialamatkan kepada Tetuan Saha yang mendakwa bahawa defendan telah cuai dalam memberi nasihat dan gagal memberi nasihat sepanjang tempoh sehingga perintah persetujuan dan defendan sepatutnya melakukan perbincangan munasabah dengan Tetuan Saha berkaitan yuran guaman yang terhutang oleh plaintif. Plaintif mendakwa: (a) pelanggaran kewajipan fidusiari dan manaha; dan (b) pelanggaran terma simpanan defendan dan kecuaian.

Diputuskan, menolak tuntutan plaitif dengan kos RM30,000:

(1) Walaupun terdapat perkataan 'lien' dalam eksh D59, ia tidak memberikan apa-apa konotasi perundangan kerana pada hakikatnya, defendan tidak memegang atau sebaliknya memiliki apa-apa wang pada masa keluaran surat itu. Secara keseluruhan, perkataan 'lien' kekal suatu label dan tidak lebh daripada itu. Mahkamah perlu melihat kepada fakta sebenar keadaan tersebut. Tetuan Saha tidak menjawab surat dalam eksh D59 itu, untuk membuktikan *consensus ad idem* antara pihak-pihak. Tiada pelanggaran kewajipan fidusiari di pihak defendan. Apa yang dilakukan oleh defendan dalam keadaan tersebut tidak boleh dalam apa cara mentafsirkan dalam apa cara sebagai mempunyai konotasi tidak jujur atau tidak setia kepada plaintif (lihat perenggan 27 & 29–30).

(2) Kausa tindakan sesuai yang patut diambil adalah untuk mengetepikan dua penghakiman persetujuan itu, kerana plaintif bertanggapan bahawa dia berhak mendapat jumlah lebih tinggi daripada apa yang direkodkan dalam penghakiman-penghakiman tersebut, defendan tidak gagal

melaksanakan kewajipan kontraktualnya dan dia juga tidak cuai kerana tidak bersetuju dengan jumlah yang kurang daripada mandat yang diberikan oleh plaintif. Oleh itu, tiada pelanggaran terma-terma simpanan dan defendan tidak cuai dalam melaksanakan kewajipannya sebagai peguamcara untuk plaintif (lihat perenggan 35 & 38–39).]

Notes

For cases on negligence, see 9 *Mallal's Digest* (5th Ed, 2015) paras 1591–1604.

Cases referred to

Bristol and West Building Society v Mothew [1988] Ch 1, CA (refd)
Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors [1981] 2 MLJ 145, FC (refd)
Groom v Crocker and Others [1938] 2 All ER 394, CA (refd)
Hammonds v Barclay (1802) 2 East 227; 102 ER 356, KB (refd)
L'Estrange v F Graucob, Ltd [1934] All ER Rep 16; [1934] 2 KB 395, KB (refd)
Malayan Banking Bhd v PK Rajamani [1994] 1 MLJ 405, SC (refd)
Overseas Union Bank v Lew Keh Lam [1999] 3 SLR 393, CA (refd)
Paal Wilson & Co A/S v Artenreederei Hannah Blumenthal [1983] 1 AC 854, HL (refd)
Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) [2014] 3 MLJ 785; [2014] 3 CLJ 73, FC (refd)
The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor [2008] 5 MLJ 469; [2008] 3 CLJ 221, FC (refd)
Victor Cham & Anor v Loh Bee Tuan [2006] 5 MLJ 359, CA (refd)

Legislation referred to

Road Transport Act 1987 ss 43(1), 96(2)

Edwin Lewis (Rachel Maryanne Verghis with him) (Edwin Lewis) for the plaintiff.
Sugandra Rao Naidu (Rao & Co) for the defendant.

Wan Ahmad Farid JC:

THE BACKGROUND FACTS

[1] This is a truly unfortunate, and to a certain extent, sad case. The plaintiff, Encik Lam Ching, who is 56 years old this month, is a gentleman who does not look his age. At times he looked frail and when he gave evidence in this court, he did not seem to be sure of certain facts that he was asked.

[2] The plaintiff, as it turned out, was involved in a motor vehicle accident while riding his motorcycle along the Cheras–Kajang highway way back in

2004. The accident was caused wholly or substantially by the negligence of the driver of a motor lorry bearing registration No WCC 8873 ('the motor lorry') and another driver of a motorcar bearing registration No WKL 3101 ('the motorcar'). In fact, a police summons was issued on 1 May 2005 against the driver of the motor lorry under s 43(1) of the Road Transport Act 1987 ('the RTA').

[3] As a result of the motor accident, the plaintiff has suffered pain and injury and severe disabilities that include cerebral concussion and fractures resulting in him not being able to stand on his right leg and to lift heavy objects with his right hand.

[4] Aggrieved by his condition, the plaintiff had appointed the defendant, which is a firm of solicitors, (at the material time was practising in the name of Messrs Yong Alias & Co), to represent him in his claim for damages for the injuries and losses that he suffered as a result of the said accident. The motor lorry was insured by Kurnia Insurans (M) Bhd ('Kurnia Insurans'), whilst the motorcar was insured by AIG General Insurance Bhd ('AIG').

[5] By a letter dated 4 January 2005, the plaintiff had authorised the defendant, then known as Messrs Yong Alias & Co, to act for him to apply for medical reports from the Kajang Hospital and Damansara Specialist Hospital where he was treated, for the purpose of filing a civil action against the drivers and/or registered owners of the motor lorry and the motorcar. Acting on that authorisation, the defendant had written to various parties including sending a notice under s 96(2) of the RTA to Kurnia Insurans. In fact, the defendant, through an exchange of letters, had been liaising with Kurnia Insurans in an attempt for a possible amicable settlement on behalf of the plaintiff.

[6] The series of correspondences between the defendant and Kurnia Insurans went on until 2007 when at one stage, Kurnia Insurans by a letter dated 21 June 2007, had offered the plaintiff a sum of RM37,000 plus costs of RM3,700 being full and final settlement of the claim. This was rejected by the defendant vide their letter to Kurnia Insurans dated 16 July 2007 since the plaintiff 'had sustained multiple injuries' and lots of money were 'incurred to medical treatment'. The defendant in that letter, had counter offered, on a without prejudice basis, a minimum figure of RM70,000 plus 10% thereof as costs being a full and final settlement.

[7] Kurnia Insurans did not accede to this counter offer. By a letter dated 21 August 2007, Kurnia Insurans had increased their offer for a full a final settlement for a sum of RM40,000 with RM4,000 costs.

[8] Despite the intense negotiations between the defendant and Kurnia Insurans for a possible amicable settlement, the plaintiff was dissatisfied with what he described as the 'lack of progress' of the said claim for loss and damages. Unbeknown to the defendant, the plaintiff, unhappy with the situation, had approached another legal firm, Messrs Saha & Assoc ('Messrs Saha') to take over the conduct of the matter. Sometime in October 2007, Messrs Saha had filed in a civil action on behalf of the plaintiff in respect of the said motor accident at the sessions court Bandar Baru Bangi vide Summons No 53–453 of 2007 ('Bandar Baru Bangi Summons'). The case went on from one case management after another. There was no settlement reached neither was the case proceeded with a full trial. Again, the plaintiff was very much dissatisfied with the whole situation.

[9] The plaintiff's dissatisfaction was reflected in his evidence during cross-examination by the defence counsel ('the DC'):

> Plaintiff: Pada permulaannya, saya sudah ... pasal kes accident, saya sudah lantik Yong. Sudah dua setengah tahun kemudian, tak ada apa-apa diselesaikan. Kemudian saya pergi cari Saha. Dua setengah tahun lagi kemudian, pun tak ada apa-apa diselesaikan sebab saya difahamkan boleh dapat pampasan RM60,000 saja. Ok. Lepas tu —
>
> DC: By Saha?
>
> Plaintiff: By Saha.
>
> DC: Ok.
>
> Interpreter: He keep(s) saying that (he) can get the compensation for RM60,000.

The plaintiff, with no settlement in sight, through his wife, Wong Yoke Foong ('SP4'), had contacted the defendant to take over the conduct of the matter in respect of the Bandar Baru Bangi Summons. To this, the defendant had agreed.

[10] After having met the defendant at the office, the plaintiff had executed a letter to formally appoint the defendant to represent him in the Bandar Baru Bangi Summons. The letter, which was dated on 29 July 2009 and marked as exh P3 is reproduced here in toto:

> To,
>
> MESSRS YONG ALIAS & CO
>
> Advocates & Solicitors
>
> No 13B, Tingkat 2,
>
> Jalan Alfa U6/F, Seksyen U6,
>
> 40150 Shah Alam
>
> Selangor Darul Ehsan.
>
> Dear sirs,

RE: SUMMONS NO 53–453–2007 BANDAR BARU BANGI SESSIONS COURT ACCIDENT INVOLVING VEHICLE NO WCC 8873 WKL 3101 & WME 1068 07–10–2004 CONSENT TO ACCEPT FOR SETTLEMENT

I hereby irrevocably authorise you to settle the above referred claim as follows: -

General Damages

& Special Damages : RM150,000.00

Dependency : -

Costs :

All in Damages : -

I/We agree that the sum of RM150,000.00 being the claims to be pay (*sic*) directly under my name, LAM CHING and I undertake to pay your Legal Fees and Disbursement after I received the full payment.

Sgd: XXX

.....

LAM CHING

NRIC: 600918-10-6159/6049918

Date: 29-7-09

[11] There was no doubt that the plaintiff did execute the letter. He did not deny it. This is evidenced during cross-examination (referring to exh P3):

DC: Yes, this is the Authorisation Letter. Saya cadangkan berdasarkan surat authorisation ini, Encik Lam Ching telah memberikan arahan kepada Tetuan Yong Alias untuk menyelesaikan kes saman Bandar Baru Bangi, kes kemalangan jalan raya untuk jumlah RM150,000.

Plaintiff: Ya.

Despite the agreed sum of settlement of RM150,000, the defendant managed to secure amicable settlements on behalf of the plaintiff with both Kurnia Insurans and AIG for a total sum of RM155,000. This is of course a lot more than the figure that was suggested by Messrs Saha which was only for RM60,000. The defendant had conceded that because the sum suggested by Messrs Saha was not up to his expectation, he had decided to revert to the defendant's firm to take conduct of the matter. In fact, during cross-examination, the plaintiff's wife, SP4, readily admitted that she and the plaintiff had accepted the global settlement sum of RM155,000 on their own free will:

DC: So Encik Lam Ching dan kamu terima RM155,000 ini, jumlah secara sukarela?

SP4: Ya.

[12] On the strength of this mandate, the defendant had managed to secure the agreements from both Kurnia Insurans and AIG culminating in the recording of judgments by consent in the Bandar Baru Bangi Summons on 7 August 2009 and 17 August 2009 respectively. As against the first and the second defendants in the aforesaid summons, a judgment of RM145,000 being general and special damages inclusive of interest and costs of RM14,500 were recorded as full and final settlement. As against the third and fourth defendants, a sum of RM10,000 was recorded being general and special damages inclusive of interest and costs of RM1,000 being full and final settlement.

[13] For the professional services rendered, the defendant was paid a sum of RM45,500. That the defendant received this amount is not in dispute.

[14] Before the consent judgments were entered, Messrs Saha had filed in an application to intervene in order to obtain their legal fees for the professional services rendered hitherto to the plaintiff. The plaintiff had engaged the defendant to resist the application which the defendant successfully did. The Bandar Baru Bangi Sessions Court had disallowed the said application to intervene on 20 October 2009.

[15] On 2 October 2014, the plaintiff had received a writ and a statement of claim from Messrs Saha claiming for the sum of RM39,877.10 being the legal fees for the professional services rendered to the plaintiff at the Magistrate's Court Bandar Baru Bangi Suit No A72–375–10 of 2014 ('the Saha Suit'). On 21 April 2015, Messrs Saha had managed to enter a summary judgment against the plaintiff in the Saha Suit for RM39,877.10 with interest thereon which as at 7 July 2015 stands at RM60,266.06. The plaintiff had appeal to the High Court in respect of the summary judgment entered against him. On 10 March 2016, the Shah Alam High Court had dismissed the plaintiff's appeal.

THE PLAINTIFF'S CLAIM

[16] The long and short of the plaintiff's claim against the defendant is basically two-fold. They can be summarised as follows:

(a) breach of fiduciary duties and trust; and

(b) breach of the terms of the defendant's retainer and negligence.

[17] On the breach of fiduciary duties and trust, the plaintiff pleaded as follows in para 34 of the statement of claim:

> 34. By reasons of what is stated above, the Defendant has acted in breach of her fiduciary duty and/or in breach of trust to the Plaintiff.

PARTICULARS OF BREACH OF FIDUCIARY DUTIES AND/OR BREACH OF TRUST

(a) Failing to act in good faith;

(b) Failing to resolve and/or to have a discussion and/or to conduct a reasonable discussion with Messrs Saha & Associates regarding the legal fees owed by the Plaintiff to Saha & Associates;

(c) Retaining the total legal fees in the sum of RM45,000.00 illegally;

(d) Placing herself in a position where her own interests conflicted with that of the Plaintif's;

(e) Failing to act at all times in the best interests of the Plaintiff, and;

(f) Failing to account for the monies paid to her on trust.

[18] The plaintiff in his statement of claim further pleaded that the defendant was negligent and in breach of the terms of the defendant's retainer. In para 36 of the statement of claim, the plaintiff pleaded as follows:

36. Further and/or in the alternative, in acting for the Plaintiff in the matter stated above, the Defendant was negligent and/or acted in breach of the terms of the retainer:

PARTICULARS OF THE DEFENDANT'S NEGLIGENCE AND

BREACH OF THE TERMS OF THE DEFENDANT'S RETAINER

(a) Failure to carry out and/or abide with the terms of the retainer;

(b) Failure to negotiate with Messrs Saha & Associates with regards to the legal fees owing;

(c) Failure to resolve outstanding legal fees owed to Messrs Saha & Associates;

(d) Failure to act in the best interests of the Plaintiff;

(e) Failure to account;

(f) Failure to obtain any cause papers before the meeting with Kurnia Insurans Berhad on 06.08.2009;

(g) Allowing the Plaintiff's claim for loss and damage to be settled at a lower sum;

(h) Advising the Plaintiff to accept the offer of RM145,000.00 and costs of 10% without any reasonable justification; and

(i) Failing to obtain the best possible result in the best interests of the Plaintiff.

THE DEFENDANT'S CASE

[19] The defendant in her defence refuted that she was in breach of any fiduciary duty and/or trust towards the plaintiff. In para 25 of her defence, the defendant pleaded that:

(a) The Defendant had acted in good faith and in the best interest of the Plaintiff when agreeing to take over the conduct and resolve the Plaintiff's claim for damages in a short time frame.

(b) The Defendant had carried out all the works relating to the Plaintiff's claim based upon the Plaintiff's instruction.

(c) In addition, the Defendant had assisted the Plaintiff to resist the application by Messrs Saha & Associates to intervene and claim for payment of the alleged legal fees.

(d) Hence, the Defendant is entitled to the sum of RM45,500.00 being the agreed payment of legal fees.

[20] As to the allegation for negligence and breach of the terms of the retainer, the defendant denied any wrongdoings and further pleaded that she had performed, carried out and completed all duties as plaintiff's solicitors in handling the Bandar Baru Bangi Summons. To support her averments, the defendant further pleaded as follows in paras 28(a)–(b) of her defence:

(a) Both the Insurance Companies had agreed to resolve the case and the Plaintiff's claim by paying the total sum of RM155,000.00 as compensation to the Plaintiff; and

(b) The Sessions Court at the Bandar Baru Bangi dismissed Messrs Saha & Associates application to intervene and to claim for the payment of the alleged legal fees from the Plaintiff.

THE NATURE OF RELATIONSHIP

[21] The nature of relationship between the plaintiff and the defendant is not only contractual. It goes beyond that. It is trite that the relationship between a client and a solicitor goes beyond a contractual one and attracts a kind of relationship that is fiduciary in nature. In the case of *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)* [2014] 3 MLJ 785; [2014] 3 CLJ 73, Hasan Lah FCJ, made this observation:

> The class of fiduciary relationships is never closed (*English v Dedham Vale Properties Ltd* [1978] 1 All ER 382, per Slade J). As can be seen from the English cases, the English judges have never attempted to formulate a comprehensive definition of who is a fiduciary. Certain relationships are well known to be fiduciary. In *Snell's Equity* (32nd Ed) [2010] Thompson Reuters at pp 172–178, the learned author

stated that the accepted categories in which the courts presume the existence of a fiduciary relationship are as follows:

(a) director vis-a-vis their companies;

(b) solicitor-client relationships;

(c) agent-principal relationship; and

(d) partnerships.

[22] Once the relationship of the fiduciary nature is established, the only thing to be addressed is whether there was any such breach. In *Victor Cham & Anor v Loh Bee Tuan* [2006] 5 MLJ 359 (CA), Arifin Zakaria JCA (as the learned Chief Justice then was) in delivering the decision of the Court of Appeal, had laid down this proposition of law:

> [21] The scope of duty of a solicitor toward his client was spelt out in *Midland Bank Trust Co Ltd & Anor v Hett, Stubbs & Kemp* [1978] 3 All ER 582 at p 583:
>
> > Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing on solicitors, or on professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it on himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as *Duchess of Argyll v Beuselinck* [1972] 2 Lloyd's Rep 172*, Griffiths v Evans and Hall v Meyrick* [1957] 2 All ER 772 demonstrate that the duty is directly related to the confines of the retainer.
>
> [22] In *Griffiths v Evans* [1957] 2 QB 455, the Court of Appeal stated that the solicitor's duty to his client would very much depend on the retainer. Thus, it was held by a majority (Denning LJ dissenting) that the solicitor in that case, being asked to advise specifically on compensation under the statutes, was not negligent in not advising as to common law rights.

WAS THE DEFENDANT IN BREACH OF HER FIDUCIARY DUTY?

[23] The nature of the fiduciary obligation is, amongst others, to act in good faith based on a relationship of trust and confidence. In the case of *The Board of Trustees of the Sabah Foundation & Ors v Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469; [2008] 3 CLJ 221 (FC), the Federal Court in its judgment states as follows:

> In law the position of the fiduciary and his obligation have been succinctly stated by Millet LJ in the English case of *Bristol and West Building Society v Mothew* [1988] Ch 1 to be as follows:
>
> A fiduciary is someone who has undertaken to act for or on behalf of another in a

A particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his B interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.

The nature of the obligation determines the nature of the breach. The various C obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere competence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.

D

[24] Millet LJ in *Bristol and West Building Society v Mothew* [1988] Ch 1 indicated that breach of fiduciary obligation connotes disloyalty or infidelity. In other words, the plaintiff must therefore prove that the defendant, in defending him must have acted in a manner that reflects disloyalty or infidelity. E Central to the allegation made against the plaintiff was that she should have conducted a reasonable discussion with Messrs Saha & Assoc regarding the legal fees owed by the plaintiff to Saha & Assoc. It is the plaintiff's case that such failure amounts to a breach of fiduciary duty.

F **[25]** But the question that arises is, was the defendant under an obligation, either contractually or professionally to conduct such 'reasonable discussion'? The defendant says she was not under such obligation. The plaintiff says she was. The key to resolve this issue would be to look at exh D59 which was a letter dated 3 August 2009 from the defendant addressed to Messrs Saha. In that G letter, the defendant intimated to the Messrs Saha:

> Kindly let us know if there is any fee due. We shall lien your fees if there is any fee due by our client.

Based on this letter, learned counsel for the plaintiff vigorously argued that the H wordings mean that the defendant had unconditionally agreed to protect and hold any of the fees due by the plaintiff to Messrs Saha. Learned counsel further argued that the material wordings of exh D59 were representation made by the defendant in her professional capacity to Messrs Saha that she would be holding whatever fee due as lien until Messrs Saha fees were paid in full.

I

[26] In response, learned counsel for the defendant submitted that the alleged lien though clearly appeared in form in exh D59 has no force of law since no amount was ever agreed by the parties namely the plaintiff and Messrs Saha. Counsel argued that if indeed there was a binding lien between Messrs

Saha and the defendant, it would have been much easier for Messrs Saha to have commenced action against the defendant rather than the plaintiff. Likewise, if indeed it was the plaintiff's stance that the alleged lien was binding, the plaintiff would have joined the plaintiff when he was sued by Messrs Saha at the magistrate's court. Again, this was not done.

[27] Grose J in *Hammonds v Barclay* (1802) 2 East 227; 102 ER 356 defined a lien at common law as a right in one man to retain that which is in his possession belonging to another till certain demands of him, the person in possession, are satisfied. The key words in my considered opinion are 'which is in his possession belonging to another'. At the time of the issuance of the letter, which was on 3 August 2009, the defendant was not holding any sum of money at all. As said earlier, the consent judgments of RM145,000 and RM10,000 were — only recorded on 7 August 2009 and 17 August 2009 respectively. The cheques pursuant to the consent judgments were dated 19 August 2009 and 28 August 2009 respectively. In any case, the cheques were in the name of the plaintiff and the defendant could not be possibly in control of the same so as to come within the meaning of 'which is in her possession belonging to another'. I therefore rule that despite the existence of the word 'lien' in exh D59, it does not carry any legal connotation since as a matter of fact, the defendant was not holding or otherwise in possession of any money at the time of the issuance of the letter. Despite of the word 'lien' being employed by a solicitor's firm, looking as whole, it remains a label and nothing more. The court has to look into the actual facts of the situation.

[28] In my considered opinion, this finding is in consonant with the decision of the then Supreme Court in *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405 (SC) which held that the correct approach would be to look at the substance, not just the label which had been attached to the document.

[29] In any case, Messrs Saha did not reply to the letter in exh D59 so as to establish a *consensus ad idem* between the parties. It is pertinent to note that a *consensus ad idem* is essential to the formation of a contract. In *Paal Wilson & Co A/S v Artenreederei Hannah Blumenthal* [1983] 1 AC 854 (HL), Lord Diplock in delivering the decision of the House of Lords said:

> To create a contract by exchange of promises between two parties where the promise of each party constitutes the consideration for the promise of the other what is necessary is that the intention of each as it has been communicated to and understood by the other (even though that which has been communicated does not represent the actual state of mind of the communicator) should coincide. That is what English lawyers mean when they resort to the Latin phrase consensus ad idem and the words that I have italicised are essential to the concept of consensus ad idem, the lack of which prevents the formation of a binding contract in English law.

> Thus if A (the offeror) makes a communication to B (the offeree), whether in writing, orally or by conduct, which in the circumstances at the time the communication was received, (a) B, if he were a reasonable man, would understand as stating A's intention to act or refrain from acting in some specified manner if B will promise on his part to act or refrain from acting in some manner also specified in the offer, and (b) if B does in fact understand A's communication to mean this, and in his turn makes to A a communication conveying his willingness so to act or refrain from acting which *mutatis mutandis* satisfied the same two conditions as respects A, the *consensus ad idem* essential to the formation of a contract in English law is complete.

[30] In answer to the subhead, it is my finding that there was no breach of fiduciary duty on the part of the defendant. What the defendant did in the circumstances could not be in any way construed as having a connotation of disloyalty or infidelity to the plaintiff. At best, it could only be regarded as incompetent, though no such finding is made here.

WAS THERE A BREACH OF THE DEFENDANT'S RETAINER?

[31] As aforesaid in *Midland Bank Trust*, the solicitor's duty to his client would 'very much depend on the retainer'. The contractual duty between solicitor and client is as set out by Scott LJ in *Groom v Crocker and Others* [1938] 2 All ER 394:

> The relationship is normally started by a retainer, but the retainer will be presumed if the conduct of the two parties shows that the relationship of solicitor and client has in fact been established between them. The retainer, when given, puts into operation the normal terms of the contractual relationship, including in particular the duty of the solicitor to protect the client's interest, and carry out his instructions in the matters to which the retainer relates, by all proper means. It is an incident of that duty that the solicitor shall consult with his client on all questions of doubt which do not fall within the express or implied discretion left him, and shall keep the client informed to such an extent as may be reasonably necessary according to the same criteria. In all these aspects, however, the tie between the two is contractual.

[32] In the instant case it is quite obvious that if at all there is any authority on the part of the defendant to negotiate with the insurance companies, that would be derived from exh P3. Exhibit P3 is essentially an authorisation letter for the defendant to settle the matter on behalf of the plaintiff. The letter even made specific reference to the Bandar Baru Bangi Summons. In effect, it gives the mandate to the defendant to secure a settlement for a sum of RM150,000. This was never in doubt. As aforesaid, the plaintiff even conceded this during cross-examination.

[33] The main thrust of the plaintiff's case is that the defendant was negligent in the advice that she gave and the advice she failed to give during the period leading up to the consent order. In other words, if the defendant had given competent and proper advice, the plaintiff would not have agreed to the consent order at the Bandar Baru Bangi Sessions Court. Instead he could have obtained a much more favourable outcome in his claim for damages. But then again, by his own admission, the plaintiff had obtained more than he asked for. Having agreed to accept RM150,000 for a full and final settlement, the plaintiff could not come to this court and say that he was unhappy with a RM155,000 settlement which was duly recorded and reflected in the consent judgments.

[34] In fact, that fact has been admitted by the plaintiff during cross-examination:

> Q: So, saya cadangkan kepada Encik Lam Ching berdasarkan muka surat 61, P-3, Tetuan Yong Alias telah mengikut arahan yang telah diberikan oleh Encik Lam Ching kepada Tetuan Yong Alias?
>
> A: Setuju.

The plaintiff has practically admitted that the defendant had followed his instruction. Having heard such an admission from the plaintiff, it is difficult for this court to conclude otherwise.

[35] In any case, I agree with the submission by the learned counsel for the defendant that if the plaintiff was under the impression that he was entitled for a higher amount than that was recorded in the two consent judgments, the proper cause of action would be for the plaintiff to take appropriate steps to set aside the said judgments. The die is not cast. There are circumstances where a consent order can be set aside; see *Ganapathy Chettiar v Lum Kum Chum & Ors; Meenachi v Lum Kum Chum & Ors* [1981] 2 MLJ 145 (FC). Unfortunately this was not done.

[36] Learned counsel for the plaintiff in his submission argued that since the plaintiff did not read or write English and Bahasa Malaysia, a lot would depend on what was actually explained by his wife, SP4 who was with him at the material time. Counsel then submitted that the defendant's heavy reliance on exhs P1–P5 is misplaced. But then again what was not in dispute is that the plaintiff had executed all the documents referred to. I can only refer to the case of *L'Estrange v F Graucob, Ltd* [1934] All ER Rep 16; [1934] 2 KB 395 for the proposition of law that because the plaintiff had signed it, he was bound by the terms of the letters, regardless of whether he had read the documents or not as long as there was no fraud or misrepresentation; see also *Overseas Union Bank v Lew Keh Lam* [1999] 3 SLR 393.

[37] The basis of the plaintiff's complaint is not that the recorded consent judgment was less than the mandated sum of RM150,000 but that it should have been more. In my opinion, the defendant would only have failed in her contractual duty with the plaintiff or being negligent had she settled any amount that was less that the mandate given by the plaintiff.

[38] It is therefore my finding that there was no breach of the terms of the retainer on the part of the defendant. I also further hold that the defendant was not negligent in carrying out her duty as the solicitor for the plaintiff. The plaintiff's claim is therefore dismissed with costs of RM30,000.

[39] In view of my decision as aforesaid, I will not address on the question whether there was any necessity to plead on special damages since there was no liability in the first place. I will also not be addressing the issue of time barred raised in the defence since it is also academic.

EPILOGUE

[40] As I said at the exordial stage, this is a very unfortunate case. It could have been avoided if proper procedures and mechanism were to be adhered to. A certain procedure has to be followed when a client wants to terminate the service of his or her solicitor. It is not that he cannot discharge his solicitor. He can do so. An obvious situation would be where there is a serious breakdown in confidence between them.

[41] I am taking this opportunity to lay down a general guideline as to how can a client terminate the services of his solicitor. It is as follows:

(a) if the relationship has come to a point of no return, the client should forthwith inform his solicitor. No reason needed to be given for the termination. Unless it is expressly provided for in the retainer, the client is not legally bound to give any reason thereto;

(b) the solicitor will then have to inform the client whether there are any agreed fees outstanding;

(c) if there is, the client must effect payment or alternatively make some arrangements as to the method of payment; and

(d) the moment this is settled or an agreement reached as to how it is to be settled, the solicitor will have to ask the client as to how to handle the existing file and relevant documents, if any, in respect of the matter in hand — either to be returned to the client or to be transmitted direct to the newly appointed solicitor.

[42] Under no circumstances can a client, unbeknown to his solicitor, approach another solicitor to take conduct of the matter while the solicitor-client relationship is still subsisting. That is highly unethical. It was Abraham Lincoln, himself a lawyer, who narrated a story of an old Dutch farmer, who reminded his companion once that 'it was not best to swap horses when crossing a stream'. Crossing a stream on horseback is never easy. That is why one does not normally change horses in mid-stream. That will at times invite a plunging of one's head or body underwater briefly — if not longer. It is called ducking. And one cannot tell as to what will happen in the process. So my general observation is that, unless it is absolutely crucial for the due process of the determination of the case, it is not desirable for a client to change his solicitor en route. But if he has to, then the proper steps as aforesaid should be adhered to.

Plaintiff's claim dismissed with costs of RM30,000.

Reported by Nisha Paran